FOR ARGUMENT

Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-422

E. C. DOTHARD, ET AL.,
APPELLANTS

VS.

BRENDA M. MIETH, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. JURISDICTION OVER THIS APPEAL WAS PROPERLY NOTED BY THIS COURT.

Although this Court has already noted probable jurisdiction over this cause, the brief filed by AFL-CIO amicus curiae raises certain questions to which appellants deem it necessary to reply. Basically, amicus urges that since part of the order appealed enjoined a state statute upon the basis of a violation of Title VII rather than a constitutional violation the case should be appealed first to Fifth Circuit Court of Appeals. Their position treats as inconsequential the facts that a state regulation was also enjoined on *both* statutory and constitutional grounds, that substantial constitutional questions were presented by the plaintiff's complaint against both the state statute and regulation and that other areas of the same order pertaining to other parties were based solely on constitutional grounds.

This case began as a joint class action brought by two female representatives of two different classes each challenging different areas of Alabama law. The class represented by Brenda M. Mieth challenged the use of height and weight requirements for employment as an Alabama State Trooper. That requirement was established by statute and made more restrictive by administrative regulation. Mieth sought an injunction against its further use alleging that it violated constitutional safeguards under 42 U.S.C., §1983 (A. 13-14). As is evident from other briefs in this cause, the part of the order below pertaining to this claim was not appealed. It was, however, before the court when the determination to convene a three-judge court was made.

The claim which resulted in this appeal was proposed by Dianne K. Rawlinson in the same complaint with Mieth. That

claim sought injunctions against both a statutory height and weight minimum requirement for law enforcement officers and an administrative regulation of the Alabama Board of Corrections. Although Rawlinson alleged procedural compliance with requirements for suit under Title VII, she also urged that both the statute and regulation challenged, in addition to being violative of her statutory rights under Title VII were also constitutionally invalid under the fourteenth amendment (A. 13-14, 177). This alleged constitutional violation by the state statutes and regulations were all proposed in the complaint before the district court when the decision to convene a three-judge court was made. The substantiality of the constitutional questions presented is evidenced by the fact that the order pertaining to the state troopers was based entirely on constitutional grounds and that the administrative regulation of the Board of Corrections was found violative of both Title VII and the fourteenth amendment. Only the height and weight requirement for prison guards was enjoined on statutory grounds alone.

The propriety of this direct appeal is established if the three-judge court was properly convened initially. Under 28 U.S.C. §1253, a direct appeal lies to this Court from any action required to be heard by a three-judge court; and, under 28 U.S.C. §2281, a three-judge court must be convened to hear any application for enjoining a state statute or regulation on the basis of unconstitutionality. The route of appeal is not made to turn upon the final basis of the decision but rather upon the gravity of the allegations.

As this Court held in *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73, 80 (1960), the fact that an action contains challenges to a state statute on both constitutional and statutory grounds does not dispense with the necessity of a three-judge court. If the constitutional violations alleged in

the complaint are not obviously frivolous or insubstantial, then an appeal from the resulting order, regardless of the ultimate holding on those issues, lies to this Court. *Locomotive Engineers v. Chicago Rock Island & Pacific R. Co.*, 382 U.S. 423, 428 (1966). The Court further indicated in *Hagans v. Lavine*, 415 U.S. 528 (1974), the perferred practice when a complaint presents independent statutory and constitutional grounds for decision is to resolve the statutory claim, if possible, through a single judge before convening a three-judge court. In the case at bar, however, the court below was faced with constitutional challenges to all statutes and regulations involved. In such a case, for a single judge to proceed would propose the exact problem which the three-judge court sought to remedy. As stated in *Jacobsen*, supra:

> "Section 2281, read in the light of this background, seems clearly to require that when, in any action to enjoin enforcement of a state statute, the injunctive decree may issue on the ground of federal unconstitutionality of the state statute, the convening of a three-judge court is necessary; and the joining in the complaint of a nonconstitutional attack along with the constitutional one does not dispense with the necessity to convene such a court. To hold to the contrary would be to permit *one* federal district judge to enjoin enforcement of a state statute on the ground of federal unconstitutionality whenever a nonconstitutional ground of attack was also alleged, and this might well defeat the purpose of §2281." 362 U.S. at 80.

Under the above discussed principles, it is clear that the three-judge court was properly convened and that this Court properly noted jurisdiction over the appeal pursuant to 28 U.S.C. §1253. Both a statute and a regulation were striken down by the court

and both were challenged on Title VII and constitutional grounds. Amicus argues in brief that a determination of the Title VII claim would preempt any inquiry into the constitutional allegations thereby making them insubstantial. AFL-CIO Amicus Curiae Brief at 6. This argument ignores the procedural, evidentiary and standing differences in actions brought under either Title VII or the fourteenth amendment and is completely untenable. Furthermore, Title VII as it applies to the states is in fact an actuating statute of the fourteenth amendment via the enforcement provisions of that amendment. For this reason, it is not dissimilar to the posture of a case asserting a constitutional violation through a "statutory" vehicle such as 42 U.S.C. §1983. Therefore an equal employment claim asserting Title VII although being procedurally different from a fourteenth amendment claim presents closely related issues of proof. Completely separate determinations of each claim would be needlessly wasteful of judicial manhours.

It is completely inconsistent for amicus to assert on one hand that Title VII and the equal protection clause are so similar as to make the latter "superfluous", and at the same time contend that the two claims are of sufficient separate identity to classify one "statutory" and the other "constitutional". Equal employment under Title VII can certainly not be more "equal" than equal employment under the fourteenth amendment.

In a case such as the present where the "statutory" claim and constitutional claim are procedurally different, but very close in actual matters of factual proof, the court should not automatically assume that the constitutional claim is insubstantial not requiring a three-judge court. The two claims so proposed could not be adequately separated to produce any efficiency as was the aim of the dicta in *Hagans* cited by Amicus. Brief of AFL-CIO at 7. Certainly, any lack of efficiency in any event does not rise to the level of a jurisdictional defect.

For these reasons, appellants assert that the three-judge court below was properly convened at the outset and that the appeal presently prosecuted from its decision properly lies in the United States Supreme Court.

II. THE CONSTITUTIONALITY OF TITLE VII'S APPLICATION TO THE STATES SHOULD BE DECIDED BY THE COURT IN THIS CAUSE.

The appellees urge that the constitutionality of Title VII's 1972 amendments should not be reviewed in this case because it was not properly presented. Appellants admit that the constitutionality of these amendments was not specifically addressed until the briefs on the merits were filed in this cause. A permissible review of this question could certainly be justified by either a broad reading of the issues in the jurisdictional statement or by the plain error doctrine under this Court's rule 40(1)(d)(2). Appellants, however, contend that the question must be addressed as it pertains to subject matter jurisdiction.

The constitutionality of Title VII's application to the states is a crucial factor to the subject matter jurisdiction over the Title VII claims presented by the case at bar. Therefore, the position of appellants that the 1972 amendments constituted an unconstitutional extension of congressional power presents a question of a jurisdictional bar which should be decided by this Court. *See e.g. Edelman v. Jordan*, 415 U.S. 651, 677-678 (1974). Moreover, since the question of constitutionality here in fact determines subject matter jurisdiction over the cause, the fact that it was not succintly raised below or in the jurisdictional statement should not bar its present resolution. *See also Schlesinger v. Councilman*, 420 U.S. 728, 743 (1975); *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975).

Furthermore, the issue has been briefed by both parties

and the Solicitor General has been notified of the challenge to the statute. In light of these facts, little reason upholds the view that the claim of unconstitutionality urged by appellants should not now be addressed by the Court.

III. THE APPLICATION TO THE STATES OF TITLE VII FROM THE 1972 AMENDMENT IS UNCONSTITUTIONAL.

Appellants readily admit the well-established power of Congress to regulate all aspects of interstate commerce even in the most incidental of areas. *See e.g. Fry v. United States*, 421 U.S. 542, 547 (1975). However, the 1972 amendments of Title VII include within their scope all state activities without requirement of even incidental effect on interstate commerce. For this reason, appellants contend that the complete state coverage under Title VII can only be based upon the congressional enforcement provisions under the fourteenth amendment.

In proposing this contention, we recognize that any sovereign interest of the states is in some cases necessarily limited by a balancing of interests as in eleventh amendment limitations established in *Fitzpatrick v. Blitzer*, ___ U.S. ___, 49 L. Ed. 2d 614 (1976). Nevertheless, our argument that Title VII is not "appropriate legislation" under the fourteenth amendment does not turn upon any offsetting specific interest of the state, but rather upon the inherent interest of state sovereignty itself. We do not contend that a congressional act must meet the same equal protection proscriptions under the fourteenth amendment as must a state act. This was the argument proposed in *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966) which we urge is inapposite. Appellants *do*, however, contend that the appropriateness of enforcement legislation by Congress should not be given mere "rubber stamp" approval by a reviewing judicial body. *See e.g., United States v. Hampshire*, 45 L.W.

2087 (1st Cir., Aug. 5, 1976); *Usery v. Salt Lake City Board of Eucation*, 45 L.W. 2155 (D. Utah, Aug. 31, 1976).

Stellar examples of valid enforcement provisions which on their face seem violative of the equal protection clause itself are found in the preferences allowed under affirmative action programs. Flexibility such as this between the enforcement means and the ends sought, allows for "congressional resourcefulness". *Katzenbach, supra*, at 648. Nevertheless, as appellants urged in their original brief, such affirmative action preferences lend no support to Title VII under the fourteenth amendment. Appellant's Brief at 21. While the good intention of Title VII is not questioned, its 1972 postscript inclusion of *all* state activities cannot be justified on the same basis as is the original enactment nor on the enforcement provisions of the fourteenth amendment.

IV. ASSUMING ARGUENDO THAT TITLE VII IS VALID IN ITS APPLICATION TO THE STATES, THE HEIGHT AND WEIGHT MINIMUMS FOR LAW ENFORCEMENT OFFICERS IN ALABAMA ARE VALID.

As Appellants argued in their initial brief, this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) is limited somewhat by its circumstances. Appellant's Brief at 39. For that reason, we contend that the statewide census figures offered by plaintiff's below to show discrimination, with no showing of impact on job applicants (or even persons in the job market), nor with any showing of past overt discrimination simply fails to present a prima facie discriminatory challenge to the Alabama statute. If no more were required than this, the court below might as well take judicial knowledge of this "discrimination". Moreover, it is hard to understand appellee's argument that the height and weight requirements dissuaded many persons from even applying due to their simple determin-

ation. Obviously, these requirements were not of common knowledge even to persons with law enforcement experience and college training such as plaintiff Rawlinson. Certainly some showing of their effect on applicants should have been required before shifting the burden to the state. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

Nevertheless, the safety and efficiency requirements under the business necessity test uphold any burden placed upon the state to defend the size requirements. The very nature of the job of a law enforcement officer and the inherent risks to the officer and those under his/her protection justify a greater deference to the employer's judgment on employee requirements. In reviewing a height requirement for airline pilots, a Missouri district court recently stated:

> "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, any pre-employment standard that discriminates against minorities should be closely examined. In such a case, the employer should face a heavy burden to demonstrate that his criteria are job related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden." *Boyd v. Ozark Air Lines, Inc.*, 45 L.W. 2135 (E. Mo., Aug. 23, 1976).

See also, Condit v. United Air Lines, Inc., 45 L.W. 2176 (E. Va., Sept. 3, 1976).

Appellants urge that the considerations of human risk involved support the Alabama legislature's conclusion that the benefits derived from sheer size are necessary enough to require

a minimum. Appellants certainly urge that the record, proper deference to legislative judgment, the nature of the job involved and matters of common experience uphold the validity of the height and weight minimums in the Alabama statute.

V. ASSUMING ARGUENDO THAT TITLE VII IS VALID IN ITS APPLICATION TO THE STATES, THE REGULATION REQUIREMENT THAT CONTACT POSITIONS IN THE ALABAMA PENITENTIARIES BE FILLED BY GUARDS OF LIKE SEX WITH THE INMATES IS VALID.

A casual reading of Regulation 204 reveals that the guard/employee's sex is a factor in assigning guards to contact positions within penitentiaries. It is not the only factor however, since the sex of inmates to be guarded must also be considered. Appellees contend that the elemental factor of the guard's sex in the decision for assignment makes this a case of explicit sex discrimination bringing into play the defense of a bona fide occupational qualification. We contend such is not the case and that the facts present only a case of disproportionate impact requiring a showing of business necessity. Appellant's Brief at 48.

Nevertheless, if this Court should require that a bona fide occupational qualification be shown to uphold Regulation 204, Appellants urge that appellees' interpretation is much too narrow. No doubt the BFOQ should not be interpreted as an exception which swallows the rule. However, the legislative history of its promulgation in no way supports appellees' position of only an imaginary existence. The exception was obviously enacted in the common sense recognition of our society's interaction but also in an attempt to prevent the future sustanance of unbased distinctions on the basis of sex. The examples of the all-male baseball team and female nurse for female

invalid cited by the appellee from the floor debates over the BFOQ, show considerably less demonstratively objective reasons for sex discrimination than does Regulation 204. Quite probably even those examples would likely fail to meet the EEOC guidelines for a BFOQ.

The use of Regulation 204 by the Alabama Board of Corrections was a common sense recognition of real factors with which they are forced to deal. Commissioner Locke's testimony recognized that sexual sterotypes do exist among the Alabama inmates. This recognition was not in furtherance of these perceptions but only that they do exist and therefore must be dealt with. Naturally, a penitentiary setting places a premium on control, security and safety. These goals require a realistic approach to human interactions and the perceptions of the inmates whether they be logically based or not. The Board's promulgation of Regulation 204 attempts to strike a balance between the rights of the employees and the goals they must achieve by recognizing that disruptive influences, degrees in the invasion of privacy, and perceptions of weaknesses do not *in fact* fall equally along sexual lines in penitentiaries.

The plaintiffs below offered no showing of any *penitentiary* setting where women were used in contact positions with male inmates, nor testimony of any expert who had supervised such a setting. Mr. Nelson's testimony offered by appellees show that he has supervised women in contact positions in a *non-penitentiary* institution for six months although the penitentiaries in that system do not use women in such positions. Alabama has used women in such institutions since 1974 (A. 289, 252). The Alabama position was found inconsistent by the court below. Appellants here urge this Court to recognize the differences in the institutions which justify the restrictions in penitentiaries which are not required in lower security/custody institutions. These factual differences justify any required showing of a BFOQ for Regulation 204.

CONCLUSION

Wherefore, based upon the above-cited authorities and reasons, the appellants urge that the finding and verdict of the Middle District of Alabama be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Walter S. Turner, Assistant Attorney General of Alabama, one of the attorneys for appellants, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 15th day of April, 1977, I served the requisite number of copies of the foregoing Reply Brief of Appellants upon the attorneys for the appellee, by mailing the same to them, first-class postage prepaid, and addressed to them as follows:

Honorable Pamela Horowitz
Honorable John Carroll

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I further certify that I also this date served in the same fashion the Solicitor General of the United States, Department of Justice, Washington, D. C., 20530, pursuant to Rule 33(2)(b) and all amicus parties.

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